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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
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Alexander L. Stevas, Clerk

HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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INDEX

	PAGE
CITATION TO OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2-5
STATEMENT OF THE CASE	5-10
HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED	10-11
REASONS FOR GRANTING THE WRIT	12-22
CONCLUSION	22

TABLE OF CITATIONS

CASES CITED	PAGE
Alford v. State (Fla. 1975) 307 So.2d 433	20
Bennet v. State (Fla. 1975) 316 So.2d 41	13
Clark v. State (Fla. 1978) 363 So.2d 331	12,13
Doyle v. Ohio (1976) 426 U.S. 610	13
Elledge v. State (Fla. 1977) 346 So.2d 998	20
Green v. Georgia (1979) 442 U.S. 95	20
Hixon v. State (Fla. 2d DCA 1964) 165 So.2d 436	15
Lockett v. Ohio (1978) 438 U.S. 586	14,18,19
Proffitt v. Florida (Fla. 1976) 428 U.S. 242	19
Shannon v. State (Fla. 1976) 335 So.2d 5	13
State v. Dixon (Fla. 1973) 283 So.2d 1	17
Stephens v. Zant (5th Cir. 1980) 631 F.2d 397	21
Stromberg v. California (1931) 283 So.2d	22
Taylor v. State (Fla. 1974) 296 So.2d 648	20
United States v. Johnson (5th Cir. 1977) 558 F.2d 1225	13
United States v. Hale (1975) 422 U.S. 171	13
United States v. Meneses-Davila (5th Cir. 198) 580 F.2d 888	14
United States v. Milne (5th Cir. 1973) 487 F.2d 1232	15

STATUTES CITED	
Florida Statutes (1975) Section 921.141	16,17,18

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October Term, 1980

HENRY PERRY SIRECI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on April 9, 1981; as modified on June 10, 1981.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Case No. 50,905, is reported at 399 So.2d 964 (Fla. 1981) and is set out in pages 26-34 of the Appendix.*

JURISDICTION

The judgment of the Supreme Court of Florida was filed on April 9, 1981, and rehearing was denied on June 10, 1981; although the opinion was modified (A 25). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. On July 28, 1981, Mr. Justice Powell granted an extension of time in which to file a petition for writ of certiorari in the above-entitled cause "to and including September 8, 1981."

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*The symbol "A" followed by the appropriate page number will designate the Appendix filed separately herewith.

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PETITIONER'S FUNDAMENTAL RIGHT TO REMAIN SILENT AND TO DUE PROCESS OF LAW WERE DENIED BY DIRECT TESTIMONY REGARDING HIS EXERCISE OF HIS RIGHT TO REMAIN SILENT AND TO AN ATTORNEY, VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II

WHETHER THE FAILURE OF THE SENTENCING JUDGE TO CONSIDER SUBSTANTIAL EVIDENCE OF PETITIONER'S SEVERE MENTAL PROBLEMS, DENIED PETITIONER A FAIR DETERMINATION ON THE ISSUE OF PUNISHMENT, AND RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO?

III

WHETHER THE RESTRICTION OF PETITIONER'S RIGHT TO PRESENT EVIDENCE OF NON-STATUTORY MITIGATING FACTORS, AND THE JUDGE'S SPECIFIC LIMITATION OF HIS CONSIDERATION OF MITIGATING CIRCUMSTANCE TO THOSE IN THE STATUTE RENDERED THE EXTREME PENALTY DISPROPORITIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO AND GREEN V. GEORGIA?

IV

WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO REMAND THIS CASE FOR RESENTENCING, WHEN ONE OF THE AGGRAVATING CIRCUMSTANCES IS IMPROPER RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a prezentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI:

In all criminal proceedings, the accused enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

... nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 921.141, FLORIDA STATUTES (1975)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. -

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.- After hearing all the evidence, the jury shall be deliberate and render an advisory sentence to the court, based upon the following matters:
(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
(a) That sufficient aggravating circumstances exist as enumerated in subsection (5),and
(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6) to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.- Aggravating circumstances shall be limited to the following:
(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.-
Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE *

Petitioner was indicted for first degree murder on February 27, 1976 (R 2). On April 13, 1976, Petitioner was determined to be indigent and counsel was appointed (R 11). On the same day, Appellant pled not guilty (R 12). Trial by jury was held on October 18-22, 1976 (T 1-760).

The present case involves the death of Howard Poteet, alleged to have taken place on December 3rd or 4th, 1975 at Poteet's Auto Sales in Orlando, Florida. The testimony at the trial can be classified in four general areas. The first area concerned the discovery of the decedent and the description of the scene. A second area of the testimony encompassed two persons who said they were with Petitioner in late November and early December of 1975. A third area involves the testimony of arresting officers and the fourth area pertained to Petitioner's alleged statements.

Richard Klawe of the Orange County Sheriff's Department testified regarding the crime scene. Mr. Klawe identified several

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*The symbol A will denote the Appendix. The following additional symbols will be used:

R	Record on Appeal
S	Transcript of Advisory Sentencing Procedure
T	Trial Transcript

photographs of the crime scene (T 32-41). Petitioner offered to stipulate to the cause of death and objected to these photographs as unnecessary and prejudicial (T 41-42). The photos were admitted in evidence (T 43-44).

Howard Poteet, Jr., stated that he arrived at Howard Poteet Motors at 7:00 A.M. He described the disarray in the office and identified his father's body. (T-54-55). The decedent's wife, Pauline Poteet, corroborated her son's testimony (T 59-70). She also stated that she later received statements showing the use of the credit cards that had been in the decedent's wallet (T 70).

Dr. Ruiz, Orange County medical examiner, said that the decedent died from multiple stab wounds (T 90). Dr. Ruiz was allowed, over objection, to show a variety of photographs of the body and explain them in great detail (T 90-113).

The second area of testimony consisted of the statements of two persons, Bonnie Arnold and Barbara Perkins, who had allegedly been with Petitioner in late November and early December of 1975. Barbara Perkins said that she met Petitioner on November 2, 1975 when he picked her up while she was hitchhiking (T 147). Petitioner later moved in with her and was living with her on the morning of the alleged homicide (T 149). Perkins testified that on the evening of December 1975, Petitioner came home and said "he was thinking of stealing a car" (T 151). She said that Petitioner wanted her to drive him to a point near a car lot so that he could go in and steal a car (T 152).

Perkins said she took Petitioner to the Rocking Chair Motel at about 5:15 P.M. (T 153) near where he was going to steal a car (T 156). She met Petitioner about 45 minutes later and they returned to her trailer (T 155, 160-161). She also answered a variety of questions concerning Petitioner's habits and lifestyle. She stated that Petitioner had carried knives (T 171). She admitted that she had been convicted of crimes four or five times (T 193).

Perkins also said that Petitioner had discussed the killing with her. According to Perkins, Petitioner had told

her that he had hit the decedent and then he turned around and jumped Petitioner (T 194). He told her that he then began stabbing the decedent (T 194-195). Perkins repeatedly stated that Petitioner had told her that he had only gone to the car lot to steal a car (T 197). Petitioner had never indicated any intention to rob or harm anyone (T 197). She emphasized that there had been no discussion of any violence to be used (T 198). She has never been charged as an accessory, conspirator, or aider and abettor for the present offense (T 222). Perkins admitted that she had forged Mr. Poteet's name on the credit card on a trip to Las Vegas, Nevada (T 223).

Bonnie Arnold also said he was with Petitioner in November and early December of 1975. He met Petitioner while playing pool at a lounge in Orlando in the early part of November of 1975 (T 444). He stated thaton either December 1st or 2nd he went to the Palm Gardens Lounge early in the evening and that he saw Petitioner there at approximately 11:00 P.M. (T 455-447). They stayed at the bar until closing time (which was between 12:00 P.M. and 1:00 A.M.) and then went to Perkins' trailer, where they all spent the night.

Arnold stated that the next day or the day after he had a conversation with Petitioner in which they discussed the alleged homicide (T 452). Petitioner said that he had gone to the car lot to "steal some keys so he could steal a car" (T 453). Petitioner said that he had gotten in a fight with the man (T 453). Arnold said that Petitioner had told him that he had gone to the lot with a tire tool in his boot and had gone there to "talk with the man and see whether he had left the keys and was going to steal the keys and then go back and steal a car" (T 455). Arnold said that Petitioner had gone there with a tire tool that he began getting it out, the decedent began attacking him and they proceeded to fight (T 455-456).

On cross-examination Arnold admitted that Petitioner could have come to the bar well before 11:00 P.M., without his being aware of Petitioner's presence (T 466). Arnold reiterated that Petitioner had told him that he had merely gone to the car lot to steal some keys so that he could steal a car and that

Petitioner had not mentioned robbing or killing anyone (T 471). Mr. Arnold stated that Petitioner had no intention to rob or kill anyone and unexpectedly got into a fight with the owner of the lot (T 473). He testified that Petitioner had never told him about stealing anything from the decedent (T 476).

The third area of testimony involved the arresting and investigating officers in the case. Detective Allen Hansen of the Orange County Sheriff's Department testified that he aided in the execution of a search warrant for an auto in Las Vegas, Nevada (T 259). He identified a jacket given him by Barbara Perkins and personal papers and photographs taken from the car (T 261). Hansen admitted that the seized items were not described in the search warrant (T 265-266).

William Monroe of the Sanford Regional Crime Lab testified about blood stains and hairs on a blue denim jacket. He said that the blood and hairs were consistent with the decedent's but that blood and hairs can not be identified, "absolutely from any individual" (T 37-1-413).

Detective Gary Arbisi of the Winnegago County, Illinois Sheriff's Department testified concerning a conversation with Petitioner on February 6, 1976 at 10:00 P.M. (T 554). Mr. Arbisi was allowed to testify about this conversation, over objection as to the voluntariness of the conversation (T 559, 593-594). Mr. Arbisi said that Petitioner had admitted owning a brown plastic knife and that he knew the decedent (T 597-598).

The fourth area of testimony involved Petitioner's alleged statements. Donald Holtzinger was in the same cell block in the Orange County Jail, with Petitioner (T 278-279) for two weeks in May of 1976 (T 281). Holtzinger claimed that Petitioner asked him to kill Petitioner's brother-in-law, who was also a witness in this case (T 284-287). Holtzinger began to discuss the details of the alleged plan when Petitioner objected and moved for a mistrial (T 287-288). Petitioner objected to this testimony as irrelevant, and highly prejudicial (T 287-288). The Court admitted this testimony, over objection (T 298-304).

Harvey Woodall testified that he was in the same cell with Petitioner in the Winnebago County Illinois jail (T 428-429).

Petitioner told Woodall that he and Barbara Perkins, went to the car lot to "borrow a car to rob a gas station" (T 434). Petitioner said that they could not get the car so they came back later and that Petitioner got into a fight with the owner of the lot and eventually killed him (T 433-434). He claimed that Petitioner had told him that Petitioner had gotten one-hundred and fifty dollars and credit cards (T 436). Woodall admitted that he had been convicted of crimes six different times (T 436).

Petitioner's brother-in-law, David Wilson, testified concerning alleged conversations with Petitioner. According to Wilson, Petitioner had told him the killing had been with a knife (T 497). Wilson knew nothing about the motive of the killing or the circumstances surrounding it (T 497). He testified that Petitioner had never told him of any intention to kill anyone (T 522).

Based upon the foregoing evidence Petitioner was found guilty of first degree murder (T 753-754).

B. Sentencing Phase

The first witness called by the prosecution in the sentencing phase was David Wilson, Petitioner's brother-in-law, He said that Petitioner had been a good worker, had always been polite and that he had never seen him made (S 15-17). He knew that Petitioner had questioned whether his father was his real father (S 21). Harvey Woodall was allowed to testify as to conversations with Petitioner (S 40-43). He stated that Petitioner did not show any remorse and that he did not feel sorry for the man (S 41-43). Woodall admitted that he had been convicted of felonies six times (S 43).

Petitioner, Henry Sireci, testified in his own behalf in the second phase of the trial. Petitioner stated he had changed his name to Butch Blackstone approximately six years before when he found out that his father was not his real father (S 49). Petitioner had been cast out of his home about twelve years before when he had had a discussion about his name with his parents (S 50-51). His mother had called him a liar and several other things (S 51). Petitioner decided that his father was not his real father (S 51). Petitioner went on

his own when he was sixteen and had traveled a lot and worked for several different companies (S 52-53). Petitioner had never been convicted of an offense involving a gun (S 58). Petitioner had been cast out of his home after having many fights with his parents (S 59).

Dr. Robert Kirkland, a psychiatrist, testified concerning Petitioner's mental condition. Dr. Kirkland was struck by Petitiooner's lack of emotional tone (S 77). He also stated that Petitioner shows signs of permanent mental disorders (S 78). He stated that Petitioner had "schizoid trends" but that they had not reached psychotic proportions (S 78). Dr. Kirkland stated:

> "He [Petitioner] is poorly equipped to handle social living, family living, not only because of the underlying character disturbance ...but also because of his past experience with family." (S 80).

Dr. Kirkland also stated that what would be moderate pressure for most persons would be extreme for Petitioner because of his development and character structure (S 81). He stated that Petitioner is unable to control his emotions in a "rational, normal manner" (S 87).

Respondentcalled Dr. Edward Herrera, a psychiatrist, in rebuttal. He stated that he felt that Petitioner suffered from a personality disorder that was sociopathic rather than schizoid (S 98-103).

Based upon the foregoing testimony the jury recommended that Petitioner be sentenced to death (S 147-148). The judge sentenced Petitioner to death in the electric chair (R 294-299).

The Supreme Court of Florida affirmed Petitioner's conviction and death sentence on April 9, 1981 (A 1-13). Petitioner's timely motion for rehearing was denied by the Florida Supreme Court on June 10, 1981 although the original opinion was modified (A 25).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised in the trial court by timely objection. On appeal the following issues were raised in the Florida Supreme Court:

I. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING COLLATERAL OFFENSES BECAUSE SUCH TESTIMONY WAS HIGHLY INFLAMATORY AND WAS NOT LOGICALLY RELEVANT.

II. THE REFUSAL TO GRANT A CONTINUANCE WHEN AN ADDITIONAL WITNESS LIST WAS FILED ON THE FIRST DAY OF TRIAL, TO STRIKE THE TESTIMONY OF DONALD HOLTZINGER AND/OR GRANT A MISTRIAL WAS ERROR AND DENIED APPELLANT DUE PROCESS OF LAW.

III. THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, REGARDING HER CREDIBILITY, AND THUS DENIED APPELLANT DUE PROCESS OF LAW.

IV. APPELLANT WAS DENIED DUE PROCESS OF LAW BY DIRECT TESTIMONY REGARDING APPELLANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

V. THE INERESTS OF JUSTICE REQUIRE A REVERSAL OF THIS CONVICTION BECAUSE THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO PROVE EITHER PREMEDITATION OR FELONY MURDER BEYOND A REASONABLE DOUBT.

VI. A. APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO NOTIFY THE DEFENDANT, PRIOR TO TRIAL, OF THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO PROVE IN THIS CASE.

B. THE TRIAL COURT HAD NO JURISDICTION TO IMPOSE A DEATH SENTENCE BECAUSE THE INDICTMENT FAILED TO ALLEGE ANY AGGRAVATING CIRCUMSTANCES.

VII. THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A. THE EXTREME PENALTY OF DEATH WAS ASSESSED AGAINST APPELLANT ON THE BASIS OF AGGRAVATING CIRCUMSTANCES THAT WERE NOT PROVEN BEYOND A REASONABLE DOUBT AND/OR WERE IMPROPERLY APPLIED: AND WHERE THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER CERTAIN MITIGATING FACTORS.

B. THE EXTREME PENALTY OF DEATH WAS ASSESSED AGAINST APPELLANT WHERE THE PROSECUTION WAS ALLOWED TO PRESENT EVIDENCE OF NON-STATUTORY AGGRAVATING FACTORS.

C. THE EXTREME PENALTY OF DEATH WAS IMPOSED UPON APPELLANT ON THE BASIS OF THE FLORIDA STATUTE WHICH UNCONSTITUTIONALLY LIMITS THE CONSIDERATION OF MITIGATING FACTORS. APPELLANT WAS IMPROPERLY LIMITED IN HIS PRESENTATION OF MITIGATING EVIDENCE.

D. THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED DUE TO THE LACK OF ANY STANDARD FOR WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

E. APPELLANT WAS DENIED HIS RIGHT TO A FAIR CROSS-SECTION OF THE COMMUNITY BY FLORIDA'S EXEMPTION, ON REQUEST, OF MOTHERS WITH CHILDREN, FROM SERVICE ON JURIES.

F. THE EXTREME PENALTY WAS ASSESSED AGAINST APPELLANT PURSUANT TO FLORIDA'S CAPITAL SENTENCING STATUTE WHICH IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Based upon these issues the Supreme Court of Florida affirmed Petitioner's conviction and death sentence (A 1-13). Petitioner filed a timely motion for rehearing in the Florida Supreme Court wherein the federal issues were again raised (A 14-24). The motion for rehearing was denied, although the opinion was modified (A 25).

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS DENIED HIS RIGHT TO REMAIN SILENT AND TO DUE PROCESS OF LAW BY DIRECT TESTIMONY REGARDING HIS EXERCISE OF HIS RIGHT TO REMAIN SILENT AND TO AN ATTORNEY, VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The essential question herein is whether a comment on post arrest silence constitutes fundamental error, which can be reviewed in the absence of an objection.

In the present case a police officer (Detective Nazurchuk) testified concerning the interrogation of Petitioner shortly after he was arrested. He stated that he read Petitioner his rights and that "he requested his attorney"(T 531-532). Nazarchuk stated the interview was then terminated (T 532). This was a direct reference to Petitioner's exercise of his right to remain silent and to an attorney.

The Florida Supreme Court originally held that Petitioner had waived this issue by his failure to object (A 7). The Court relied on Clark v. State, 363 So.2d 331 (Fla. 1978) for this principle (which was decided two years after Petitioner's trial) (A 7). The Court also held that the comment was harmless in light of the entire record (A 7). On Rehearing, the Court

modified its opinion and directed that all references to the harmless error doctrine be deleted (A 25).

Prior to the decision in Clark, supra the Florida Supreme Court had always held a comment on silence to be fundamental error; requiring reversal without consideration of the existence of an objection or of the harmless error doctrine. Bennet v. State, 316 So.2d 41 (Fla. 1975); Willinsky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976). This was the rule in effect at the time of Petitioner's trial. Although Clark, supra has imposed the requirement of a contemporaneous objection, no Florida case has ever applied the harmless error rule to a comment on silence.

This Court has consistently held that a comment on a defendant's silence is constitutional error, requiring reversal. As this Court stated in United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975):

> "Respondent's silence during police interrogation lacked significant probative value...any reference to his silence... carried, with it an intolerably prejudicial impact." 422 U.S. at 180.

The inherent prejudice in direct testimony upon a defendant's silence after being given his Miranda warnings has been further developed by this Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). As the Court stated:

> "Silence in the wake of these [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus every post-arrest silence is insolubly ambiguous... Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives such warnings." 426 U.S. at 617, 618.

Thus, it is clear that comment upon a defendant's exercise of his right to silence, after his Miranda warnings is fundamentally unfair and inherently prejudicial.

The Fifth Circuit Court of Appeals has specifically held that a comment on silence constitutes fundamental error, which can warrant reversal even in the absence of an objection. United States v. Johnson, 558 F.2d 1225 (5th Cir. 1977);

United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978). (Although these cases discuss the applicability of the harmless error doctrine, Florida has never applied this rule to a comment on silence). Thus the federal courts have clearly held that a comment on silence can be reviewed absent an objection.

Appellant was clearly denied his right to remain silent and to due process of law. The ruling below denying Petitioner's review of this issue is contrary to existing federal case law. Accordingly this Court should grant certiorari to resolve this disharmony, and to prevent a substantial denial of Petitioner's constitutional rights.

II

THE FAILURE OF THE SENTENCING JUDGE TO CONSIDER SUBSTANTIAL EVIDENCE OF PETITIONER'S SEVERE MENTAL PROBLEMS, DENIED HIM A FAIR DETERMINATION ON THE ISSUE OF PUNISHMENT, AND RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO.

The question herein involves the trial judge's failure to weigh evidence of Petitioner's severe mental and emotional problems in relation to the statutory mitigating circumstances or as non-statutory mitigating factors under this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978).

The evidence of Petitioner's mental and emotional problems was substantial and was completely ignored by the trial judge. Petitioner suffered a tremendous emotional shock when he was sixteen years old and he became convinced that his father was not his real father (S21, 49-51). This led to serious conflicts with the restof Petitioner's family, including one incident where his mother called him a liar (S 49-52). Petitioner eventually changed his name to Blackstone because he was certain that his father was not his real father (S 49). This incident and the continuing battles with his family over this issue severely damaged his emotional development.

At approximately the same time that Petitioner was becoming convinced that his father was not his real father, he was in an auto accident in which he suffered severe damage to his head (Deposition of Laura Sireci, 6; Deposition of

Virginia Wilson, 11). Petitioner's sister stated that he never was the same after the accident and that he showed other manifestations of mental disorders (Deposition of Virginia Wilson, 11). The combination of Petitioner's problems with his family and his severe head injury resulted in extreme mental and emotional problems throughout his life.

Petitioner's mental and emotional problems were documented by the testimony of the court-appointed psychiatrists and the statements of his relatives. One of the psychiatrists who examined Petitioner stated:

> "I think he shows certain permanent disorders. He shows some of the symptoms of mental disorder.... I think he does show certain schizoid trends.... and this is an accepted mental disorder." (S 78).

This psychiatrist further described Petitioner's inability to cope with social situations and to handle stress:

> "He is poorly equipped to handle social living, family living, not only because of the underlying character disturbance that I mentioned, but also because of his past experience with family.... I can only state, such individuals as I have described, do not handle pressure very well. (S 81)

This psychiatrist pointed out that the situation that Petitioner found himself in was extreme mental pressure for Petitioner even if it would not have been extreme mental pressure for most people. The other psychiatrist who examoned Petitioner agreed that Petitioner suffered from "a personality disorder" (S 98). Petitioner clearly suffered from a mental or emotional disturbance.

The statements of Petitioner's relatives, especially his sister, substantiate Petitioner's mental problems. It is aciomatic that lay testimony about a defendant's mental condition is admissible if it is based on personal knowledge and observation. Hixon v. State, 165 So.2d 436 (Fla. 2d DCA 1964); United States v. Milne, 487 F.2d 1232 (5th Cir. 1973). The members of Petitioner's family all felt that he had serous mental problems. In fact they decided to help the police find Petitioner because they believed he would receive psychiatric help. (Deposition of Virginia Wilson 7-8).

Petitioner's family was convinced that he had serious mental problems. Petitioner's sister stated that:

> "He is not a normal, sane, ordinary person.... Anybody who knows him, knows he is not normal.... He is not sane. Even an ordinary average person can tell that." (Deposition of Virginia Wilson, 9-10).

Petitioner's sister and brother (Virginia and Peter) firmly believed not only that he had severe mental problems but that he was insane. These were the people who had grown up with Petitioner and who had seen him every day for years. They had the best opportunity to observe the changes that occurred in Petitioner when he became convinced that his father was not his real father and when he received severe head injuries. Petitioner's sister also stated that the only reason his family had not alreay obtained psychiatric help for him was a lack of money (Deposition of Virginia Wilson, 12).

Mental factors are critical in weighing the properiety of the death sentence. The three statutory mitigating circumstances relating to a defendant's mental condition apply in this case. Fla.Stat. §921.141(6)(b)(e)(f)(1975). Subsection (6) states that the fact that the defendant was "under the influence of extreme mental or emotional disturbance" should be considered in mitigation. This subsection is clearly applicable to Petitioner. One of the psychiatrists directly stated that Petitioner was under more mental pressure than he was capable of handling (S 81). He also testified that Petitioner was suffering from a permanent personality disorder (S 78). The other psychiatrist also stated that Petitioner had a personality disorder (S 98).

However, the trial judge incorrectly refused to weigh this factor and stated in his sentencing order that both psychiatrists had said that Petitioner was not under the influence of any extreme mental pressure (R 295-296), as one of the psychiatrists had said thathe was (S 81). The statements of Petitioner's relatives, especially his sister, point to Petitioner being under the influence of a severe mental or emotional disturbance (Deposition of Virginia Wilson, 9-11). The Florida

Supreme Court has stated that his mitigating factor "is easily interpreted as less than insanity but more than the emotion of an average man, however inflamed." [Emphasis supplied] State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). This situation describes Petitioner's condidtion at the timeof this offense. All of the evidence in this case emphasizes the fact that Petitioner suffered from a permanent personality disorder and that he suffered from an extreme mental disturbance.

Subsection (e) of the statute states that the fact that the defendant acted under "extreme duress" should be considered in mitigation. Fla.Stat. §921.141(6)(e)(1975). This mitigating factor applies to Petitioner. Petitioner was under more pressure than he was capable of handling and this was certainly extreme duress in the light of Petitioner's past history and continuing personality disorders.

Subsection (f) should be considered in mitigation. Fla.Stat. §921.141(6)(f)(1975). The Florida Supreme Court has recognized that this subsection is designed to cover a "mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong." State v. Dixon, supra, 283 So.2d at 10. The functionof this mitigating circumstance is to provide some mitigation of sentence for a person who is legally sane but has mental problems short of insanity:

> "Like subsection (b), this circumstance is provided to protect that person, who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." Id.

Petitioner's mental disorders seriously impaired his ability to conform his conduct to the law, according to the testimony of Dr. Kirkland who testified that Petitioner had a schizoid personality (S 78). The following exchange then took place.

> "Q. Would the person having a schizoid personality be unable to control his emotions in a rational normal manner as we know them?

A. Yes, sir.

Q. And would he be more likely to do an act which would be cruel?

A. Well, I think, he is more likely to be peculiar, eccentric, odd, and his actions I think, he lacks, let's say, the depth of personality that is involved in controlling our behavior." [Emphasis supplied] (S 87).

While Dr. Herrerra thought that Petitioner's personality disorder was more sociopathic than schizoid, he also stated that Petitioner suffered from a personality disorder that made it difficult for him to, "conform to the way of society" (S 99). The evidence establishes each of the three statutory mental factors in mitigation. However, the trial court refused to consider these factors.

Assuming arguendo, that evidence does not establish any of the statutory mitigating factors, this evidence must still be given "independent mitigating weight". Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). The trial judge gave no consideration to this evidence. The Florida Supreme Court recognized that Petitioner suffered from psychological problems specifically personality disorders (A 33). The Florida Supreme Court held that these factors do not need to be considered in mitigation. This is directly contrary to this Court's mandate in Lockett, supra. Petitioner's death sentence is disproportionate as applied due to this error of constitutional magnitude.

III

THE TRIAL JUDGE'S SPECIFIC LIMITATION OF HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN THE STATUTE AND RESTRICTION OF PETITIONER'S RIGHT TO PRESENT EVIDENCE OF NON-STATUTORY MITIGATING FACTORS RENDERED THE EXTREME PENALTY DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE EXPRESS COMMANDS OF LOCKETT V. OHIO AND GREEN V. GEORGIA.

This issue involves the trial judge's specific limitation of his consideration of mitigating factors to those in the statute and the restriction of Petitioner's presentation of evidence of non-statutory mitigating factors. The judge began his Findings of Fact with the following language.

"As directed by Florida Statutes 921.141(3) the Court has weighed and applied the total evidence received to the legislatively mandated criteria of "aggravating" and

"mitigating" circumstances." (R 24).

The sentencing judge expressly limited himself to the statutory mitigating factors and refused to take into account any evidence of non-statutory mitigating factors, such as Petitioner's problems with his parents, the fact that he had been forced out of his house at an early age and had led the outcase life of a "vagabond". (See Point II supra).

This restriction by the judge is directly contrary to the mandate of this Court as expressed in Lockett, supra and Proffitt v. Florida, 428 U.S. 242 (Fla. 1976). This Court has held that any evidence in mitigation, which in any way relates to the defendant's character or record, the circumstances of the offense, or the appropriateness of the penalty of death, must be given" independent mitigating weight". Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

In Lockett, supra this Court specifically discussed Florida's capital felony statute:

> "Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed in approving the statute, was not exclusive.... None of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any apsect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." [Emphasis Supplied]. 438 U.S. at 606.

When this Court upheld the Florida statute it was on the assumption that the statutory mitigating factors were not exclusive. See also Proffitt v. Florida, supra, 428 U.S. at n. 8.

The judge not only limited his consideration of mitigating circumstance, but prohibited Petitioner from introducing evidence pointing to innocence in the sentencing phase of the trial (S 53-56). This was an improper limitation of the consideration of mitigating factors. Some doubt (even if it is less than "reasonable doubt") about the defendant's guilt is recognized as a mitigating factor. The possibility of executing an innocent person, however slight that possibility may be, is clearly a factor to be considered in deciding

if the death penalty is proper. The Florida Supreme Court has noted this consideration in Alford v. State, 307 So.2d 433 (Fla. 1975) in affirming the death sentence:

> "Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an 'innocent' man being sentenced to die." Id. at 445.

The Florida Supreme Court has recognized that the lack of doubt about a defendant's guilt is a factor to be considered in deciding whether to affirm a death sentence.

The Florida Supreme Court has also recognized this factor in reversing the Petitioner's death sentence in Taylor v. State, 294 So.2d 648, 652 (Fla. 1974). Accordingly, doubt about the defendant's guilt is a mitigating factor (even if it does not rise to a level mandating a judgment of acquittal. Petitioner should have been allowed to introduce evidence which would raise some doubt about his guilt and he was denied this right (S 53-56). This Court has held evidence pointing to doubt about guilt to be admissible in the sentencing phase, even where state evidentiary rules had prohibited it. Green v. Georgia, 442 U.S. 95 (1979).

Therefore, the judge's specific restriction of his consideration of mitigating factors to those in the statute and his restriction of evidence of non-statutory mitigating factors, rendered Petitioner's death sentence disproportionate.

IV

THE FLORIDA SUPREME COURT'S FAILURE TO REMAND THIS CASE FOR RESENTENCING WHEN ONE OF THE AGGRAVATING CIRCUMSTANCES IS IMPROPER, RENDERED THE DEATH SENTENCE DISPROPORTIONATE AS APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue involves the Florida Supreme Court's application of a harmless error rule when Elledge v. State, 346 So.2d 998 (Fla. 1977) when it holds an aggravating circumstance to be improper, but finds no mitigating circumstances.

The Florida Supreme Court conceded in its own opinion that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, but held that this error

does not require resentencing. This is clearly violative of the constitutional requirements laid out by the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In Stephens, supra the trial court had found three aggravating circumstances and the Fifth Circuit Court of Appeal found one of them to be invalid. Id. at 405-406. The Court remanded for resentencing, stating:

> The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.
>
> In Strongberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).
>
> It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. Id. at 406.

The Court took this position without regard to the presence or absence of mitigating circumstances. Indeed, there is nothing in the record to suggest the presence of mitigating circumstances.

Thus the mandate of Stephens, supra and of this Court's decision in Stromberg v. California, 283 U.S. 359 (1931) clearly require resentencing when any of the aggravating circumstances are improper, regardless of the presence of mitigating circumstances. The failure to remand for resentencing is especially egregious in the present case, where the trial judge ignored evidence of Petitioner's severe mental problems.

CONCLUSION

This case involves significant constitutional right, including the right to remain silent, to due process of law, and the application of Florida's death penalty statute. The ruling below collides with these constitutional guarantees and review by this Court is necessary to resolve this disharmony. For these reasons the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX TO APPENDIX

	PAGE
Original Opinion, Supreme Court of Florida Sireci v. State, Case No. 50,905 Opinion Issued April 9, 1981 (Fla. 1981)	1-13
Motion for Rehearing	14-24
Order Denying Motion for Rehearing, and Modifying Original Opinion	25
Opinion, Supreme Court of Florida Sireci v. State, 399 So.2d 964 (Fla. 1981)	26-34

Supreme Court of Florida

No. 50,905

HENRY PERRY SIRECI, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 9, 1981]

ADKINS, J.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. We have jurisdiction.

The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins

that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

The defendant contends that the killing was a spur-of-the-moment act occurring after a fight had begun and that he entered the used car lot without any intent to rob or harm the victim. His only intent was to take keys from the office in order to return, after the office was closed, for a car. Defendant says this negates the element of premeditation.

Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the

act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA) cert. denied, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958). Weighing the evidence in light of these standards it is clear that the premeditation of the defendant has been proved beyond a reasonable doubt.

The defendant stated to witness Perkins, in recounting the incident, that he hit the victim with the lug wrench, and demanded from the victim the location of the victim's money. The victim would not tell him, so the defendant stabbed him. The defendant told witness Perkins that he had looked all over for the money, but couldn't find any, so he took the man's wallet. The evidence shows that the defendant needed money, since he was not working and was preparing to go on a trip. The evidence was also sufficient to sustain a finding by the jury that defendant was guilty of felony murder. There was clearly sufficient, competent evidence by virtue of the circumstances, the physical evidence, and the defendant's own statements, to support the jury's verdict of guilty of murder in the first degree. Every reasonable hypothesis of innocence was excluded.

The defendant questions the admissibility of testimony from his former cellmate, Holtzinger, regarding an alleged attempt by the defendant to have his brother-in-law, Wilson, killed.[1] The defendant says this was an improper reference to a collateral offense. Wilson testified as to various statements made by the defendant which fully implicated him in the crime charged. He also testified that the defendant gave details about the knife and where the homicide took place. The defendant told Wilson where the knife was located and Wilson retrieved the knife

at that location and turned it over to the authorities. The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction. Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. denied, 362 U.S. 965 (1960). A defendant's attempt to intimidate a state witness is relevant and admissible. Vaccaro v. State, 152 Fla. 123, 11 So.2d 186 (Fla. 1942); Roberson v. State, 40 Fla. 509, 24 So. 474 (1898).

It is axiomatic that evidence of another crime is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, so that the evidence of such other crime would have a relevant or material bearing upon some essential aspect of the offense being tried. Ashley v. State, 265 So.2d 685 (Fla. 1972); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as the evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. Ashley v. State, supra.

The defendant contends that he was unduly prejudiced by the state's failure to include the name of Donald Holtzinger on a written witness list until the day of the trial. He argues that the trial court erred in refusing to strike Holtzinger's testimony. The defendant moved to continue the trial on the grounds that he had been given an additional list of five witnesses shortly before the trial and the state had failed to comply with the requirements of Florida Rule of Criminal Procedure 3.220. Compliance with this rule, i.e., furnishing a list of witnesses, does not necessarily have to be in writing.

The state was aware of the existence of this witness approximately four months prior to trial. Within two weeks after the state became aware of the witness, the detective who had the witness's name and the contents of his relevant information was deposed by the defendant's first attorney. The detective, at this deposition, informed the defendant's attorney of the witness Holtzinger, and that Holtzinger had been talking with the defendant about the incident in question. The initial witness list supplied to the defense concluded with the statement, "together with any other persons named in any investigative or laboratory reports or other documents furnished in compliance." Furthermore, Holtzinger's name was number 28 on the praecipe for witness subpoena, which was filed twelve days prior to trial. Additionally, defendant's counsel was made aware of the witness Holtzinger by prior defense counsel one week before trial. Finally, written notice was given to defense counsel two days before Holtzinger's testimony. A comprehensive inquiry, as contemplated by Richardson v. State, 246 So.2d 771 (Fla. 1971), was made by the trial court. It is axiomatic that a motion for continuance is addressed to the sound discretion of the trial judge. Raulerson v. State, 102 So.2d 281 (Fla. 1958). The defendant has failed to show that there was an abuse of the trial judge's discretion and has further failed to show that any prejudice resulted by the failure to include Holtzinger's name in an earlier written witness list.

In Mobley v. State, 327 So.2d 900 (Fla. 3d DCA), cert. denied, 341 So.2d 292 (1976), the court held that even though the state failed to provide the defendant with the name of a witness pursuant to a defense request for a typical discovery, the trial court did not abuse its discretion in denying defendant's motions to exclude the witness and in denying defendant's motion for continuance, where the defendant was given an opportunity to speak with the witness and where the name of the witness was listed in at least three places on defendant's arrest report. In Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), this Court held that the defendant had not been

unfairly surprised by the fact that a ballistics expert had been left off the list of witnesses, where defense counsel reasonably should have been aware of the state's proposed proof by reason of information already known to the defendant. See also Floyd v. State, 361 So.2d 802 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1366 (1979); Cooper v. State, 56 So.2d 911 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1364 (1979).

During the cross-examination of state witness Perkins the defense attempted to impeach her by use of the fact that during a deposition she had refused to answer questions on the advice of her attorney and pursuant to her attorney's objection on the grounds that she may be incriminated. Perkins admitted that this was the content of her deposition. Apparently defendant had information that public defender Bowen had worked out a deal in her behalf so that she would acquire immunity in exchange for her testimony. The defendant says that reversible error was committed because he was restricted in his cross examination of Perkins, so that he could not make inquiry as to the existence of an immunity contact.

However, the record discloses that defendant's counsel questioned her fully and in detail regarding any agreement which was made or promises which were received in return for her testimony. Perkins testified there was no agreement not to prosecute in exchange for her testimony. She was not charged with the commission of any offense in connection with the incident. She stated that she had not been led to believe, or assured, that she could not be prosecuted. On cross-examination she testified that she had not entered into any agreement with the prosecutor in connection with any offense in exchange for her testimony in the case. She knew of no deal worked out in her behalf by public defender Bowen in exchange for her testimony. The trial court clearly indicated defense counsel could attempt to impeach the witness's testimony regarding the fact that there had been no arrangement between her and the state for her testimony at the trial. However, no impeachment testimony was offered.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Mancebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1217 (1978). The defendant has failed to show any abuse of discretion on the part of the trial court.

Detective Nazurchuk testified concerning the interrogation of the defendant shortly after he was arrested. He stated that he read defendant his rights and that "he requested his attorney." The detective stated that the interview was then terminated. The defendant says he was denied due process of law by the introduction of this testimony which was a direct comment upon his exercise of his constitutional right to remain silent. The defendant made no objection to the admission of this testimony nor did he move for a mistrial. Under these circumstances he did not comply with the principles set forth in Clark v. State, 363 So.2d 331 (Fla. 1978), so he is not entitled to relief on appeal.

In considering the total record we cannot say that the statement by the detectives should be considered as fundamental error in view of its minimal impact. Doyle v. Ohio, 426 U.S. 610 (1976), clearly indicates that the harmless error doctrine could be applicable to this type of error. There was overwhelming evidence of defendant's guilt. In fact, the defendant had admitted his guilt to various witnesses produced by the state who were not law enforcement officers. We believe that the harmless error doctrine should be applied in a capital case where there is overwhelming evidence of defendant's guilt. There is no merit to this contention of the defendant.

Section 40.01(1), Florida Statutes (1977), provides that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request. The defendant's contention that this statute denies his right to a fair cross-section of the community on his jury is without merit. McArthur v. State, 351 So.2d 972 (Fla. 1977).

The defendant claims that he was denied due process of law by the state's failure to notify him prior to trial of the aggravating circumstances the state intended to prove in the case. This argument is without merit. Menendez v. State, 368 So.2d 1278 (Fla. 1979); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). Section 921.141(5), Florida Statutes (1977), defines the aggravating circumstances that may be considered by both the judge and the jury. This clearly rebuts the defendant's argument that he had no notice of the aggravating circumstances on which the state would rely.

The statutes in some other states specifically require that notice of the aggravating circumstances be given to the defendant prior to trial. The defendant's reliance upon cases from these jurisdictions is misplaced for it is irrelevant what other state statutes require in this regard. Even in the absence of such a provision, the Florida statute is constitutional and has been so held. Proffitt v. Florida, 428 U.S. 242 (1976); Menendez, supra; Spinkellink, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, sub nom. Hunter v. Florida, 416 U.S. 943 (1974).

The defendant argues that in order for the trial court to have the requisite jurisdiction to impose the death sentence, a listing of the aggravating circumstances which the state intends to rely upon must be contained in the indictment. This argument is also without merit. When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death, as provided in section 775.082 and 921.141, Florida Statutes, (1977). The indictment charged all the elements of murder in the first degree and the defendant had notice of the aggravating circumstances.

In support of his position defendant has cited Arthur v. State, 351 So.2d 60 (Fla. 4th DCA 1977), which seems to indicate that, before the trial court can impose a mandatory minimum three-year sentence pursuant to section 775.087(2), Florida Statutes (1977), the allegation that defendant carried a firearm

must be contained in the indictment. The mandatory minimum three-year sentence pursuant to the above statute is a separate sentence enhancement, which is not contained and for which notice is not provided in the particular statute with which a defendant is charged. Defendant in the case sub judice, being charged with murder in the first degree, is immediately placed on notice that he is charged with a capital felony punishable as provided by statute. Defendant also cites cases regarding the burglary and robbery statutes, arguing that the different degrees of burglary and robbery constitute the application of varying aggravating circumstances, analogous to the aggravating circumstances in a capitol felony. This argument is also without merit. Sections 810.02 and 812.13, Florida Statutes (1977), do not charge burglary and robbery with varying sentences depending upon the applicability of certain "aggravating circumstances." These statutes charge burglary and robbery in different degrees, each degree carrying different sentences. A defendant would not be on notice of which degree of burglary or robbery was charged unless the necessary allegations bringing the particular charge into a certain section of the burglary or robbery statute were contained in the information. See Growden v. State, 372 So.2d 930 (Fla. 1979).

Defendant contends that the death sentence was imposed upon defendant on the basis of aggravating circumstances that were not proved beyond a reasonable doubt and were improperly applied. He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Defendant argues that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain. He relies upon Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), where this Court said that pecuniary

gain cannot be doubled up with robbery in such a manner that two factors are considered as separate aggravating circumstances. In his findings of fact, the trial judge indicated that he was aware that in evaluating aggravating and mitigating circumstances he must not engage in a mere counting process of "x" number of aggravating circumstances and "x" number of mitigating circumstances, but rather a reasoned judgment. The mere recitation of these two factors does not condemn the death sentence. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Fleming v. State, 374 So.2d 954 (Fla. 1979).

As other aggravating factors, the Court found that defendant's intent in murdering the victim was for the purpose of avoiding arrest; that, at the time he committed the murder, the defendant had been previously convicted of a felony involving violence or threat of violence (robbery); and that the murder was especially heinous, atrocious, and cruel. The trial court found no mitigating circumstances. Even if the trial court improperly considered one or more aggravating factors, such is harmless in view of the fact that there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. Elledge v. State, 346 So.2d 998 (Fla. 1977).

Defendant counters with a contention that there were mitigating factors. He says that the trial court failed to give proper weight to evidence of the defendant's mental or emotional problems. It appears from the evidence that any psychological or emotional disorders of the defendant were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Defendant is attempting to argue the applicability of the psychological mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing has been presented which would have the effect of requiring this Court to disturb the findings of the judge. See Raulerson v. State, 358 So.2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978).

The defendant further argues that the state presented evidence to the jury of a non-statutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976), the fact that the defendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in Hargrave v. State, 366 So.2d 1 (Fla. 1978), the statements of the defendant that he had killed before and it would not bother him to kill again were considered as applicable to a consideration of whether or not the aggravating factor of "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case sub judice the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

Defendant contends that the Florida statute unconstitutionally limits the consideration of mitigating factors, relying upon Lockett v. Ohio, 438 U.S. 586 (1978). Lockett indicates that the sentencer cannot be precluded from considering, as mitigating factors, any aspect of defendant's character or record or any circumstances of the offense that the defendant may proffer as a basis for a sentence of less than death. However, the United States Supreme Court also clearly indicated that the trial court may exclude, as irrelevant, any evidence not bearing upon the defendant's character or record, or circumstances of the offense. Florida's death penalty statute comports with Lockett, supra, and has been so interpreted. Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Defendant, however, says that he was restricted in the presentation of evidence during the sentencing phase. The evidence which he attempted to introduce allegedly would have

pointed to his innocence. This argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of defendant's trial. A further repetition of evidence pointing to guilt or innocence in the case sub judice would have been repetitive and pointless in the sentencing phase. The trial judge clearly recognized his duty to consider evidence in mitigation when he said that "all evidence of mitigating circumstances may be considered by the judge or jury." He also recognized his duty to assess, by a process of reasoned judgment, what factual situtations required the imposition of death and which could be satisfied by life imprisonment in light of the totality of the circumstances present. The trial judge found no mitigating curcumstances to be present. This is not a situation where the judge refused to hear certain evidence of mitigating circumstances.

We have carefully reviewed the record and find no merit in the points raised by defendant for reversal of his conviction or reduction of his sentence.

Finding no reversible error, the judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

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[1] The incriminating statements made by defendant to his cellmates were not the result of any initiation of law enforcement. The cellmates came to the police after the statements were made. As a result, United States v. Henry, no. 799-121, 48 U.S.L.W. 4703 (June 18, 1980); Malone v. State, 390 So.2d 338 (Fla. 1980) are not applicable.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Orange County

Maurice M. Paul, Judge - Case No. 76-532

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Assistant Public Defender, and Richard B. Greene, Assistant Public Defender, West Palm Beach, Florida,

for Appellant

Jim Smith, Attorney General, and Robert L. Bogen, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

HENRY PERRY DIRECT, JR.,	)	
Appellant,	)	
vs.	)	CASE NO. 50,905
STATE OF FLORIDA,	)	
Appellee.	)	

MOTION FOR REHEARING

Appellant, HENRY PERRY DIRECT, JR., respectfully requests this Honorable Court to grant rehearing from its opinion filed April 9, 1981, and as grounds therefore, states:

1. This Court, in its opinion, seems to have created a rule that any evidence of prior offenses or bad acts is admissible if logically relevant. If this is indeed, now the law in Florida, it is in conflict with the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals and numerous Florida decisions. As the United States Supreme Court has stated in Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948):

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime ....
>
> The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. Id. at 476.

The Fifth Circuit Court of Appeals has laid out several safeguards for determining the admissibility of evidence of other crimes or bad acts in United States v. Tagliono, 546 F.2d 194 (5th Cir. 1977):

> The federal courts recognize as a cardinal principle of the common law that evidence of the commission of a wholly separate and independent crime is inadmissible as part of the case against the defendant. See Michelson v. United States, 335 U.S. 469, 475 76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The reason for this rule is, of course, that the guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense. However, the courts have carved out a number of exceptions to this rule; one of which is that evidence of other offenses is admissible to show criminal intent.
>
> Before an exception to the general rule may be invoked, the trial court must be satisfied that several pre-requisites have been met: (1) there is plain, clear and convincing evidence of a prior similar offense, (2) the prior offense is not too remote in time, (3) intent is a material issue in the instant case, and (4) there is substantial need for the probative value of the evidence. United States v. San Martin, 5 Cir. 1974, 505 F.2d 918, 921, 22. The danger of the prejudicial effect of similar offenses is such that all of these prerequisites must be met before being admitted into evidence. San Martin, 505 F.2d at 923. Id. at 199.

The Fifth Circuit Court of Appeals further delineated these principles in United States v. San Martin, 505 F.2d 918 (5th Cir. 1974).

> It is a cardinal principle of the common law that the prosecution may not use evidence of prior criminal acts in its case-in-chief to prove that the defendant committed the crime with which he is presently charged. See, Michelson v. United States, 335 U.S. 469, 475,476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)....
>
> We have repeatedly noted that the general rule is "just and wise" in order to avoid the enormous danger of prejudice to the defendant that the evidence of prior crimes creates

> and we have recently cautioned that "exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule." United States v. Miller, 500 F.2d 751, 762 (5th Cir. 1974). See also, e.g., United States v. Goodwin, 492 F.2d 1141, 1150 (5th Cir. 1974); United States v. Lawrence, 5th Cir., 480 F.2d 688, 691, 692, n.6; United States v. Broadway, 477 F.2d 991, 994-995 (5th Cir. 1973); United States v. Johnson, 453 F.2d 1195, 1199 (5th Cir. 1972); United States v. Boyd, 446 F.2d 1267, 1270-1271 (5th Cir. 1971). Id. at 921.

Thus, it is clear that the admission of prior crimes or bad acts is an exception to the general rule of exclusion, and is only to be allowed within stringent limits.

The Fifth Circuit applied these principles in United States v. Silva, 580 F.2d 144 (5th Cir. 1978). In Silva, supra the prosecution offered evidence of similar offenses that would be clearly relevant on the question of intent, which was an element of the crime charged. Id. at 147-148. The Court held that even though the evidence was clearly relevant to an element of the offense, it was inadmissible in Silva, supra; because the defense presented was one of mistaken identity, thus, there was no necessity to prove intent as it was not the primary issue contested. Id. at 148.

The Florida courts have also held that logical relevancy is not the only question the trial court must consider in determining the admissibility of evidence of other crimes or bad acts. This Court's opinion merely cited that Williams v. State, 110 So.2d 654 (Fla. 1959) and Ashley v. State, 265 So.2d 685 (Fla. 1972) for the principle that any logically relevant evidence is admissible. However, this Court has overlooked subsequent cases explaining the original holding of Williams, supra.

Subsequent decisions by this Court have further defined the scope of the Williams rule. In Williams v. State, 117 So.2d 473 (Fla. 1960) [hereinafter referred to as Williams II]this Court noted that evidence of a collateral

crime may be admissible, if limited, but that the evidence could become objectionable if it becomes a feature of the case. 117 So.2d at 475. Williams II recognized that the concepts of both "logical" and legal" relevancy must govern. Recent decisions have also recognized that the trial court must balance the probative value of the evidence against its prejudicial effect. E.g., Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977); Josey v. State, 336 So.2d 119 (Fla. 1st DCA 1976); Dodson v. State, 334 So.2d 305 (Fla. 1st DCA 1976); Colbert v. State, 320 So.2d 853 (Fla. 1st DCA 1975).

Thus, evidence which may be relevant to a material issue may still be inadmissible if its prejudicial effect outweighs its probative value. This is the concept of "legal" relevancy. Cf. Florida Evidence Code, §90.403. The court in Smith v. State, supra listed three factors to be weighed in determining whether or not the evidence should be admitted:

> "One factor is the issue of relevancy itself. To what extent is the objectionable evidence relevant....A second factor is the necessity of the testimony.[1] How important is the testimony of the state's case....A third factor might be termed 'quality of testimony'. Was the testimony directly related to the material issues of the case, or was it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him." Id. at 918.

The trial court has a duty to balance the prejudicial effect of the evidence against its probative value. Collateral offense evidence must meet a three part test for its admission and presentation to be proper: (1) It must be relevant to a material issue in the case; (2) its probative value must outweigh its prejudicial effect; and (3) It must not be presented in such a manner that it becomes a feature, rather than an incident of the trial.

The evidence in this case is extremely weak under

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[1] Appellant recognizes that this Court has rejected necessity as a precondition to admissibility in Ruffin v. State, ___ So.2d ___, Case Nos. 55,684 and 56,741. Opinion filed March 21, 1981, 1981 FLW 228 (Fla. 1981); however need is still a factor to be considered in determining admissibility.

all three factors laid out in Smith v. State, supra. This testimony was only marginally relevant to any issue in the case. These matters were allegedly admitted to show the "culpability and the guilt of the Defendant" (T 289-290). The main issue in this case was the degree of murder and the appropriate penalty. This was the basis of Appellant's closing argument and was the major contested issues in the first phase of this trial (T 702-712). Appellant's alleged attempt to kill a witness would have no relevance to the question of whether a defendant might attempt to eliminate a witness if guilty of any degree of murder. An attempt to eliminate a witness would not shed any light on this issue.

The second factor recognized in the Smith case was the necessity of the testimony to the state's case. Appellee produced other evidence to connect Appellant to the alleged homicide. The evidence of the alleged attempt to kill Wilson was unnecessary to Appellee's case and was designed to inflame the jury against Appellant.

In Smith v. State, supra the court pointed out that the appellant had conceded the killing and was relying on extenuating circumstances as his defense. 344 So.2d at 918. This is analogous to the present case where the real issues were the degree of murder and the appropriate penalty. The Court noted in Smith that the fact that the Appellant had conceded the killing had eliminated the need for "every shred of evidence and every word of testimony was of little necessity to Appellee's case.

The collateral offense evidence was also extremely weak under the third factor laid out in Smith v. State, supra; i.e. the "quality of the testimony". This testimony was only tangentially related to any of the material issues in the case. It was "more inclined to demonstrate the bad character of" appellant. Id. at 918.

The main effect of this testimony was not to shed light on any issue in the case. It was an attempt to show

that the defendant was a bad person with a propensity for violence. The admission of the evidence was an attempt to influence the jury to convict Appellant of first degree murder and sentence him to death because of his "bad character" rather than because the facts of the case showed this to be a first degree murder.

2. This Court has overlooked the fact that there are two collateral offenses admitted into evidence. This Court's opinion only discusses the admissibility of the alleged attempt to kill Mr. Wilson. The continual reference to another alleged homicide is clear, reversible error which this Court has ignored in its opinion.

Appellant was prejudiced by the use of testimony implying that Appellant was involved in another murder. David Wilson repeatedly implied during his testimony that Appellant was involved in some other murder. Wilson was asked why he had called the F.B.I. after he had spoken with Appellant. The following exchange took place:

> "A. To try and find out if there was some murder.
>
> Q. All right.
>
> A. Or murders. [Emphasis supplied] (T 495).

This was a deliberate attempt by the state's witness to imply that Appellant had been involved in some other murder. Mr. Wilson repeated this attempt later in his testimony. He was asked what the purpose was in altering the knife. He answered:

> "He wanted to be sure they were dead." (Emphasis supplied.) (T 514).

This was the third time in which Mr. Wilson had used the plural form and thereby continued to imply that Appellant was involved in another murder. Appellant moved for a mistrial on this ground and this motion was denied (T 536-538). This evidence had no probative value and was highly prejudicial.

3. This Court's opinion holds that Holtzinger's name was not placed on the written list until the day of trial; but that this is not reversible error because the trial judge

made "a comprehensive inquiry as contemplated by Richardson v. State, 246 So.2d 771 (Fla. 1971). However, the trial judge denied Appellant's motion for continuance without any inquiry whatsoever (Motion to Continue 13-14). This is clearly in violation of the holding of Richardson, supra. The trial judge's mid-trial denial of appellant's motion for mistrial was based on the alleged "lateness" of appellants' objection (Transcript 344). However, Appellant had raised this point in his pre-trial motion for continuance.

4. This Court's statement that a comment on post arrest silence can be harmless error is dicta, as this Court also held that this issue was not properly preserved under Clark v. State, 363 So.2d 331 (Fla. 1978). However, these comments in dicta cannot be overlooked as they directly conflict with existing Florida law. This Court has held in Clark v. State, 363 So.2d 331 (Fla. 1978); Bennee v. State; and Shannon v. State, 335 So.2d 5 (Fla. 1976) that the admission of a comment on post arrest silence is always reversible error; if properly preserved.

6. This Court reaffirmed the constitutionality of Section 40.01 (1) Florida Statutes (1977) (providing that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request); merely citing McArthur v. State, 351 So.2d 972 (Fla. 1977).

McArthur, supra was decided before the landmark case of Duren v. Missouri, 439 U.S. 357 (1979). In Duren, supra the United States Supreme Court clearly held that a sexually based exemption, on request, is unconstitutional, if not rationally based, as denying a defendant the rights to a fair cross-section of the community. In Duren, the Court held unconstitutional a Missouri law which allowed all women to exclude themselves, on request, when men could only claim such a privilege if over 65.

In Florida any expectant mother or mother of a child under 15 years of age may be exempted from jury duty upon

request. §40.01 (1), Fla.Stat. (1977). While the United States Supreme Court has recognized that the State has an appropriate interest in assuring that family members are able to perform child care duties, the means of achieving this must not deny a defendant his right to a fair cross-section of the community. 439 U.S. at 670.

The exemption at issue is both under-inclusive and over-inclusive and thus unnecessarily deprives defendants of their right to a fair cross-section of the community. The statute is underinclusive because it only exempts the mothers of young children. The fathers of small children, who have child care responsibilities, have no similar exemption. This is a sex-based exclusion which has no rational relation to any state interest. If the State is going to assert its interest in responsible child-care, it must assert it equally in favor of women and men who have child care responsibilities since such sex-descrimination is forbidden by our Constitution.

This exemption is also over-inclusive because it allows all women with young children to exempt themselves whether they have child-care responsibilities or not. Many women with children under 15 have no child-care responsibilities. Their children may be in school, in day-care centers or may be taken care of by relatives. Yet, these women may excuse themselves without any showing of a need to perform child-care duties. Thus, this exemption is also over-inclusive and unnecessarily excludes women from the jury pool; thus unnecessarily denying Appellant a fair cross-section of the community in violation fo the Sixth and Fourteenth Amendments.

Therefore, the Florida jury statute is unconstitutional on its face as denying the right to a fair cross-section of the community under the Sixth and Fourteenth Amendments.

7. This Court concedes in its own opinion that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, but holds that this error does not require resentencing. This is clearly violative of the

constitutional requirements laid out by the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). In Stephens, supra the trial court had found three aggravating circumstances and the Fifth Circuit Court of Appeal found one of them to be invalid. Id. at 405-406. The Court remanded for resentencing, stating:

> The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.
>
> In Stromberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).
>
> It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. Id. at 406.

The Court took this position without regard to the presence or absence of mitigating circumstances. Indeed, there is

nothing in the record to suggest the presence of mitigating circumstances.

8. This Court also held that Appellant suffered from psychological problems; specifically personality disorders. This Court also recognized the fact that Appellant had severe family problems after he discovered that his father was not his real father. However, this Court holds that these factors do not need to be considered in mitigation. This is directly contrary to the mandate of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978). The Court in Lockett stated:

> "We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death... a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U.S. 604-605 (plurality opinion) [Emphasis supplied].

Thus, it is clear that it is reversible error to not give independent mitigating to any factor relating to the defendant's character or record, or the circumstances of the offense. Here, neither judge, jury, nor this Court considered these factors in mitigation. This clearly requires resentencing; especially when considered in light of the clear erroneous aggravating circumstance and the questionable nature of the other aggravating factors.

9. This Court held that evidence of "lack of remorse" is admissible to show that the offense is "heinous, atrocious or cruel". This is contrary to prior decisions of this Court and the United States Supreme Court. The application of this crime is limited to those homicides which are "accompanied by such additional acts as to set the crime apart from the normal

capital felonies" [Emphasis Supplied]. State v. Dixon, supra 283 So.2d 1, 9. The key to whether this factor applies is whether the victim was tortured in any way and not the defendant's attitude after the crime. This Court has specifically rejected actions long after the crime as irrelevant to this issue. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). In Kampff v. State, 371 So.2d 1007, the trial judge had relied on the fact that the defendant had shown no remorse and had said "good" when told his victim was dead in his finding that the homicide was "heinous, atrocious, or cruel." 371 So.2d at 1009-1010. This Court rejected the trial judge's finding, holding this evidence to be irrelevant. Id. at 1010.

In Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 the United States Supreme Court rejected a finding that the homicid was "outrageously or wantonly vile, horrible or inhuman" (the Georgia equivalent of Florida's heinous, atrocious or cruel) even though after the killing the defendant had said "I've done a hideous crime, ... but I have been thinking about it for eight years... I'd do it again." 100 S.Ct. at 1763. The Court held that the application of this aggravating circumstance is dependent or torture of the victim. Thus, any post-death actions or attitudes are irrelevant under Florida law and Federal law.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant a rehearing, and vacate its prior opinion in the above-styled case.

Respectfully submitted,

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BY _____
RICHARD B. GREENE
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 10, 1981

HENRY PERRY SIRECI,	**	
Appellant,	**	CASE NO. 50,905
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Case No. 76-532 (Orange)
Appellee.	**	

The motion for rehearing is denied except as to Ground #4 which requests this Court to delete its statement that a comment on post arrest silence can be harmless error. The opinion filed April 9, 1981, is hereby revised by deleting the third complete paragraph on page 7.

The application for stay of judgment and for stay of execution is granted and proceedings in this Court and in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, are hereby stayed to and including July 10, 1981, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

C
cc: Hon. Randall Kirkland, Clerk
Hon. Maurice M. Paul, Judge

Richard B. Greene, Esquire
Robert L. Bogen, Esquire

death sentences and would remand for resentencing by the trial judge only.

Henry Perry SIRECI, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 50905.

Supreme Court of Florida.

April 9, 1981.

As Corrected on Denial of Rehearing June 10, 1981.

Defendant was convicted before the Circuit Court, Orange County, Maurice M. Paul, J., of first-degree murder and was sentenced to death, and he took direct appeal. The Supreme Court, Adkins, J., held that: (1) evidence proved premeditation beyond reasonable doubt; (2) defendant's former cell mate's testimony in regard to defendant's statements relating to attempt to have his brother-in-law killed for purpose of preventing him from testifying was admissible; (3) refusal to strike a state witness' testimony for alleged failure to include his name on written witness list until day of trial was not abuse of discretion; (4) failure to notify defendant prior to trial of the aggravating circumstances which state intended to prove did not deny defendant due process; (5) even if trial court improperly considered one or more aggravating factors, such impropriety would have been harmless; (6) defendant was not entitled to relief on theory that trial court failed to give proper weight to evidence of defendant's mental or emotional problems; (7) it was not shown that trial court considered "lack of remorse" as a separate aggravating factor; and (8) refusal, during sentencing phase, to permit defendant to present evidence allegedly pointing to his innocence was not error.

Judgment and sentence affirmed.

1. Homicide ⇐232

Premeditation can be shown by circumstantial evidence.

2. Homicide ⇐14(1)

"Premeditation" is a fully formed purpose to kill, which exists in mind of perpetrator for sufficient length of time to permit a reflection, and in pursuance of which an act of killing ensues.

See publication Words and Phrases for other judicial constructions and definitions.

3. Homicide ⇐14(2)

Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act.

4. Homicide ⇐232

Evidence from which premeditation may be inferred includes such matters as nature of the weapon used, presence or absence of adequate provocation, previous difficulties between the parties, or the manner in which the homicide was committed and nature of the wounds inflicted.

5. Homicide ⇐14(2)

Premeditation must exist for such time before the homicide as will enable accused to be conscious of nature of deed he is about to commit and probable result to flow from it, insofar as life of victim is concerned.

6. Homicide ⇐253(3)

In proceeding in which defendant was convicted of first-degree murder, evidence, including evidence that defendant needed money and that he stated that he hit victim with wrench and demanded that victim disclose location of his money and that defendant stabbed victim because he would not tell defendant where the money was proved premeditation beyond reasonable doubt.

7. Homicide ⇐253(6)

In proceeding in which defendant was convicted of first-degree murder, evidence was sufficient to sustain a finding that defendant was guilty of felony-murder.

8. Criminal Law ⇐351(10)

In proceeding in which defendant was convicted of first-degree murder, defendant's former cell mate's testimony in regard to defendant's statements relating to his alleged attempt to have his brother-in-law killed so as to prevent him from testifying was admissible.

9. Criminal Law ⇐351(1)

Evidence that a suspected person has in any manner endeavored to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against accused where relevance of such evidence is based on consciousness of guilt inferred from such actions.

10. Criminal Law ⇐351(10)

Defendant's attempt to intimidate a state witness is relevant and admissible.

11. Criminal Law ⇐369.15, 371(1, 12), 372(1)

Evidence of another crime is admissible if it casts light on character of act under investigation by showing either motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality, so that evidence of such other crime would have a relevant or material bearing on some essential aspect of the offense being tried.

12. Criminal Law ⇐369.2(1)

Test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible.

13. Criminal Law ⇐629

Compliance with rule requiring furnishing of a list of witnesses does not necessarily have to be in writing. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

14. Criminal Law ⇐629

In murder prosecution, refusal to strike state witness' testimony for alleged failure to include his name on written witness list until day of trial was not abuse of discretion, in light of fact that detective, at a deposition, had informed defendant's attorney of the witness and that he had been talking with defendant, that initial witness list concluded with statement "together with any other persons named in * * * reports or other documents furnished in compliance," that witness' name was on praecipe for witness subpoena filed 12 days prior to trial, that defense counsel was made aware of witness one week before trial and that written notice was given two days before witness' testimony. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

15. Witnesses ⇐267

Defendant, who was convicted of first-degree murder, failed to show any abuse of discretion in regard to alleged restriction of his cross-examination of state witness.

16. Constitutional Law ⇐266.1(1)

Defendant, who was convicted of first-degree murder, was not entitled to relief on appeal on basis of contention that he was denied due process by introduction of testimony, in which detective stated that he read defendant his rights and that "he requested his attorney" and which was assertedly a direct comment on his exercise of his constitutional right to remain silent, in light of fact that defendant had made incriminating statements to many people including a confession to his brother-in-law. U.S.C.A. Const. Amends. 5, 14.

17. Jury ⇐33(1)

Statute, which provides that any expectant mother or mother with child under 15 years of age may be exempted from jury duty on request, does not deny an accused his right to a fair cross section of the community on his jury. West's F.S.A. § 40.-01(1).

18. Constitutional Law ⇐270(1)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, State's failure to notify defendant prior to trial of the aggravating circumstances the State intended to prove did not deny defendant due process. West's F.S.A. § 921.141(5); U.S.C.A.Const. Amend. 14.

19. Indictment and Information ⇐113

Indictment need not contain list of aggravating circumstances, which state intends to rely on, in order for trial court to have jurisdiction to impose death sentence. West's F.S.A. §§ 775.082, 775.087(2), 921.141.

20. Criminal Law ⇐1159.2(5)

Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings.

21. Homicide ⇐354

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on theory that trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain, in light of fact, that though judge recited such two factors, he indicated that he was aware that in evaluating aggravating and mitigating circumstances he was not to engage in a mere counting process of "x" number of aggravating circumstances, and "x" number of mitigating circumstances, but, rather, was to make a reasoned judgment. West's F.S.A. §§ 775.082, 921.141.

22. Homicide ⇐343

Even if trial court improperly considered one or more aggravating factors in proceeding in which defendant was convicted of first-degree murder and was sentenced to death, such impropriety would have been harmless, in view of fact that there were no mitigating factors and that at least one or more statutorily listed aggravating factors were present. West's F.S.A. §§ 775.082, 921.141.

23. Homicide ⇐354

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on basis of contention that trial court failed to give proper weight to evidence of defendant's mental or emotional problems, though he may have had personality disorders relating to fact that he discovered that person believed to be defendant's father was not his real father. West's F.S.A. §§ 775.082, 921.141.

24. Homicide ⇐354

Though lack of remorse cannot constitute an aggravating circumstance in determining whether death sentence should be imposed, it can be offered to jury and judge as a factor which goes into the equation of whether or not crime was specially heinous, atrocious or cruel. West's F.S.A. §§ 775.082, 921.141.

25. Homicide ⇐327

On appeal from judgment adjudging defendant guilty of first-degree murder and sentencing him to death, it was not shown that trial court had considered "lack of remorse" as a separate aggravating factor. West's F.S.A. §§ 775.082, 921.141.

26. Criminal Law ⇐1206(1)

Death penalty statute does not unconstitutionally limit consideration of mitigating factors. West's F.S.A. § 921.141.

27. Homicide ⇐354

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal, during sentencing phase, to permit defendant to present evidence allegedly pointing to his innocence was not error. West's F.S.A. §§ 775.082, 921.141.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Chief Asst. Public Defender, and Richard B. Greene, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen. and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. We have jurisdiction.

The defendant, Sireci, went to a used car lot, entered the office, and discussed buying a car with the victim Poteet, the owner of a car lot. Defendant argues that the purpose of his visit was to take some keys from the

rack so that he could come back later and steal an automobile. The state argues that defendant went to the used car lot for the purpose of robbing the owner at that time.

The defendant was armed with a wrench and a knife. A struggle ensued. The victim suffered multiple stab wounds, lacerations, and abrasions. An external examination of the body revealed a total of fifty-five stab and incisive wounds, all located on the chest, back, head, and extremities. The stab wounds evoked massive external and internal hemorrhages which were the cause of death. The neck was slit.

The defendant told his girlfriend, Barbara Perkins, that he was talking to the victim about a car, then he hit the victim in the head with the wrench. When the man turned around, the defendant asked where the money was, but the man wouldn't tell the defendant, so he stabbed the man. The defendant told Perkins that he killed Poteet. He admitted taking the wallet from the victim.

Harvey Woodall, defendant's cellmate when he was arrested in Illinois, testified that the defendant had described the manner in which he killed the victim. According to Woodall's testimony, the defendant hit the victim with a wrench, then a fight ensued in which the windows were broken, and the defendant stabbed the man over sixty times. The defendant stated that he wasn't going to leave any witnesses to testify against him and that he knew the man was dead when he left. The defendant told Woodall he got around $150.00 plus credit cards.

The defendant also described the crime to Bonnie Arnold. According to Arnold, the defendant stated that the car lot owner and he were talking about selling the defendant a car, when the defendant hit the victim with a tire tool. A fight began and the defendant stabbed the victim. The defendant told Arnold that he was going in to steal some car keys and then come back later to steal a car.

The defendant told David Wilson, his brother-in-law, that he killed the victim with a five or six-inch knife and took credit cards from the victim.

The defendant contends that the killing was a spur-of-the-moment act occurring after a fight had begun and that he entered the used car lot without any intent to rob or harm the victim. His only intent was to take keys from the office in order to return, after the office was closed, for a car. Defendant says this negates the element of premeditation.

[1-6] Premeditation can be shown by circumstantial evidence. *Spinkellink v. State*, 313 So.2d 666 (Fla.1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. *Weaver v. State*, 220 So.2d 53 (Fla. 2d DCA), *cert. denied*, 225 So.2d 913 (1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. *Hernandez v. State*, 273 So.2d 130 (Fla. 1st DCA) *cert. denied*, 277 So.2d 287 (1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. *Larry v. State*, 104 So.2d 352 (Fla.1958). Weighing the evidence in light of these standards it is clear that the premeditation of the defendant has been proved beyond a reasonable doubt.

[7] The defendant stated to witness Perkins, in recounting the incident, that he hit the victim with the lug wrench, and demanded from the victim the location of the victim's money. The victim would not tell him, so the defendant stabbed him.

The defendant told witness Perkins that he had looked all over for the money, but couldn't find any, so he took the man's wallet. The evidence shows that the defendant needed money, since he was not working and was preparing to go on a trip. The evidence was also sufficient to sustain a finding by the jury that defendant was guilty of felony murder. There was clearly sufficient, competent evidence by virtue of the circumstances, the physical evidence, and the defendant's own statements, to support the jury's verdict of guilty of murder in the first degree. Every reasonable hypothesis of innocence was excluded.

[8–10] The defendant questions the admissibility of testimony from his former cellmate, Holtzinger, regarding an alleged attempt by the defendant to have his brother-in-law, Wilson, killed.[1] The defendant says this was an improper reference to a collateral offense. Wilson testified as to various statements made by the defendant which fully implicated him in the crime charged. He also testified that the defendant gave details about the knife and where the homicide took place. The defendant told Wilson where the knife was located and Wilson retrieved the knife at that location and turned it over to the authorities. The defendant told Holtzinger that the purpose of eliminating Wilson and preventing him from testifying was to discredit the testimony of witness Perkins, thereby avoiding a conviction. Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any *ex post facto* indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions. *Mackiewicz v. State*, 114 So.2d 684 (Fla.1959), *cert. denied*, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960). A defendant's attempt to intimidate a state witness is relevant and admissible. *Vaccaro v. State*, 152 Fla. 123, 11 So.2d 186 (Fla. 1942); *Roberson v. State*, 40 Fla. 509, 24 So. 474 (1898).

[11, 12] It is axiomatic that evidence of another crime is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, so that the evidence of such other crime would have a relevant or material bearing upon some essential aspect of the offense being tried. *Ashley v. State*, 265 So.2d 685 (Fla.1972); *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 103, 4 L.Ed.2d 86 (1959). The test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as the evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. *Ashley v. State*, *supra*.

[13] The defendant contends that he was unduly prejudiced by the state's failure to include the name of Donald Holtzinger on a written witness list until the day of the trial. He argues that the trial court erred in refusing to strike Holtzinger's testimony. The defendant moved to continue the trial on the grounds that he had been given an additional list of five witnesses shortly before the trial and the state had failed to comply with the requirements of Florida Rule of Criminal Procedure 3.220. Compliance with this rule, *i. e.*, furnishing a list of witnesses, does not necessarily have to be in writing.

[14] The state was aware of the existence of this witness approximately four months prior to trial. Within two weeks after the state became aware of the witness, the detective who had the witness's name and the contents of his relevant information was deposed by the defendant's first attorney. The detective, at this deposition, informed the defendant's attorney of the witness Holtzinger, and that Holtzinger had been talking with the defendant about the

1. The incriminating statements made by defendant to his cellmates were not the result of any initiation of law enforcement. The cellmates came to the police after the statements were made. As a result, *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Malone v. State*, 390 So.2d 338 (Fla. 1980) are not applicable.

incident in question. The initial witness list supplied to the defense concluded with the statement, "together with any other persons named in any investigative or laboratory reports or other documents furnished in compliance." Furthermore, Holtzinger's name was number 28 on the praecipe for witness subpoena, which was filed twelve days prior to trial. Additionally, defendant's counsel was made aware of the witness Holtzinger by prior defense counsel one week before trial. Finally, written notice was given to defense counsel two days before Holtzinger's testimony. A comprehensive inquiry, as contemplated by *Richardson v. State*, 246 So.2d 771 (Fla.1971), was made by the trial court. It is axiomatic that a motion for continuance is addressed to the sound discretion of the trial judge. *Raulerson v. State*, 102 So.2d 281 (Fla.1958). The defendant has failed to show that there was an abuse of the trial judge's discretion and has further failed to show that any prejudice resulted by the failure to include Holtzinger's name in an earlier written witness list.

In *Mobley v. State*, 327 So.2d 900 (Fla. 3d DCA), *cert. denied*, 341 So.2d 292 (Fla.1976), the court held that even though the state failed to provide the defendant with the name of a witness pursuant to a defense request for a typical discovery, the trial court did not abuse its discretion in denying defendant's motions to exclude the witness and in denying defendant's motion for continuance, where the defendant was given an opportunity to speak with the witness and where the name of the witness was listed in at least three places on defendant's arrest report. In *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), this Court held that the defendant had not been unfairly surprised by the fact that a ballistics expert had been left off the list of witnesses, where defense counsel reasonably should have been aware of the state's proposed proof by reason of information already known to the defendant. *See also Floyd v. State*, 361 So.2d 802 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1366 (Fla.1979); *Cooper v. State*, 356 So.2d 911 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1364 (Fla. 1979).

[15] During the cross-examination of state witness Perkins the defense attempted to impeach her by use of the fact that during a deposition she had refused to answer questions on the advice of her attorney and pursuant to her attorney's objection on the grounds that she may be incriminated. Perkins admitted that this was the content of her deposition. Apparently defendant had information that public defender Bowen had worked out a deal in her behalf so that she would acquire immunity in exchange for her testimony. The defendant says that reversible error was committed because he was restricted in his cross examination of Perkins, so that he could not make inquiry as to the existence of an immunity contract.

However, the record discloses that defendant's counsel questioned her fully and in detail regarding any agreement which was made or promises which were received in return for her testimony. Perkins testified there was no agreement not to prosecute in exchange for her testimony. She was not charged with the commission of any offense in connection with the incident. She stated that she had not been led to believe, or assured, that she could not be prosecuted. On cross-examination she testified that she had not entered into any agreement with the prosecutor in connection with any offense in exchange for her testimony in the case. She knew of no deal worked out in her behalf by public defender Bowen in exchange for her testimony. The trial court clearly indicated defense counsel could attempt to impeach the witness's testimony regarding the fact that there had been no arrangement between her and the state for her testimony at the trial. However, no impeachment testimony was offered.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse

of discretion. *Mancebo v. State*, 350 So.2d 1098 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1217 (Fla.1978). The defendant has failed to show any abuse of discretion on the part of the trial court.

[16] Detective Nazurchuk testified concerning the interrogation of the defendant shortly after he was arrested. He stated that he read defendant his rights and that "he requested his attorney." The detective stated that the interview was then terminated. The defendant says he was denied due process of law by the introduction of this testimony which was a direct comment upon his exercise of his constitutional right to remain silent. The defendant made incriminating statements to many people, including a confession to his brother-in-law.

[17] Section 40.01(1), Florida Statutes (1977), provides that any expectant mother or mother of a child under fifteen years of age may be exempted from jury duty upon request. The defendant's contention that this statute denies his right to a fair cross-section of the community on his jury is without merit. *McArthur v. State*, 351 So.2d 972 (Fla.1977).

[18] The defendant claims that he was denied due process of law by the state's failure to notify him prior to trial of the aggravating circumstances the state intended to prove in the case. This argument is without merit. *Menendez v. State*, 368 So.2d 1278 (Fla.1979); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). Section 921.141(5), Florida Statutes (1977), defines the aggravating circumstances that may be considered by both the judge and the jury. This clearly rebuts the defendant's argument that he had no notice of the aggravating circumstances on which the state would rely.

The statutes in some other states specifically require that notice of the aggravating circumstances be given to the defendant prior to trial. The defendant's reliance upon cases from these jurisdictions is misplaced for it is irrelevant what other state statutes require in this regard. Even in the absence of such a provision, the Florida statute is constitutional and has been so held. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Menendez, supra; Spinkellink, supra; State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied, sub nom. Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

[19] The defendant argues that in order for the trial court to have the requisite jurisdiction to impose the death sentence, a listing of the aggravating circumstances which the state intends to rely upon must be contained in the indictment. This argument is also without merit. When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death, as provided in section 775.082 and 921.141, Florida Statutes (1977). The indictment charged all the elements of murder in the first degree and the defendant had notice of the aggravating circumstances.

In support of his position defendant has cited *Arthur v. State*, 351 So.2d 60 (Fla. 4th DCA 1977), which seems to indicate that, before the trial court can impose a mandatory minimum three-year sentence pursuant to section 775.087(2), Florida Statutes (1977), the allegation that defendant carried a fireman must be contained in the indictment. The mandatory minimum three-year sentence pursuant to the above statute is a separate sentence enhancement, which is not contained and for which notice is not provided in the particular statute with which a defendant is charged. Defendant in the case *sub judice*, being charged with murder in the first degree, is immediately placed on notice that he is charged with a capital felony punishable as provided by statute. Defendant also cites cases regarding the burglary and robbery statutes, arguing that the different degrees of burglary and robbery constitute the application of varying aggravating circumstances, analogous to the aggravating circumstances in a capital felony. This argument is also without merit. Sections 810.02 and 812.13, Flor-

ida Statutes (1977), do not charge burglary and robbery with varying sentences depending upon the applicability of certain "aggravating circumstances." These statutes charge burglary and robbery in different degrees, each degree carrying different sentences. A defendant would not be on notice of which degree of burglary or robbery was charged unless the necessary allegations bringing the particular charge into a certain section of the burglary or robbery statute were contained in the information. *See Growden v. State*, 372 So.2d 930 (Fla.1979).

[20] Defendant contends that the death sentence was imposed upon defendant on the basis of aggravating circumstances that were not proved beyond a reasonable doubt and were improperly applied. He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Lucas v. State*, 376 So.2d 1149 (Fla.1979).

[21] Defendant argues that the trial judge improperly doubled the aggravating circumstances of robbery and pecuniary gain. He relies upon *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), where this Court said that pecuniary gain cannot be doubled up with robbery in such a manner that two factors are considered as separate aggravating circumstances. In his findings of fact, the trial judge indicated that he was aware that in evaluating aggravating and mitigating circumstances he must not engage in a mere counting process of "x" number of aggravating circumstances and "x" number of mitigating circumstances, but rather a reasoned judgment. The mere recitation of these two factors does not condemn the death sentence. *Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Fleming v. State*, 374 So.2d 954 (Fla.1979).

[22] As other aggravating factors, the Court found that defendant's intent in murdering the victim was for the purpose of avoiding arrest; that, at the time he committed the murder, the defendant had been previously convicted of a felony involving violence or threat of violence (robbery); and that the murder was especially heinous, atrocious, and cruel. The trial court found no mitigating circumstances. Even if the trial court improperly considered one or more aggravating factors, such is harmless in view of the fact that there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. *Elledge v. State*, 346 So.2d 998 (Fla.1977).

[23] Defendant counters with a contention that there were mitigating factors. He says that the trial court failed to give proper weight to evidence of the defendant's mental or emotional problems. It appears from the evidence that any psychological or emotional disorders of the defendant were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Defendant is attempting to argue the applicability of the psychological mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing has been presented which would have the effect of requiring this Court to disturb the findings of the judge. *See Raulerson v. State*, 358 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978).

[24, 25] The defendant further argues that the state presented evidence to the jury of a non-statutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), the fact that the de-

fendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in *Hargrave v. State*, 366 So.2d 1 (Fla.1978), the statements of the defendant that he had killed before and it would not bother him to kill again were considered as applicable to a consideration of whether or not the aggravating factor of "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case *sub judice* the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

[26, 27] Defendant contends that the Florida statute unconstitutionally limits the consideration of mitigating factors, relying upon *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* indicates that the sentencer cannot be precluded from considering, as mitigating factors, any aspect of defendant's character or record or any circumstances of the offense that the defendant may proffer as a basis for a sentence of less than death. However, the United States Supreme Court also clearly indicated that the trial court may exclude, as irrelevant, any evidence not bearing upon the defendant's character or record, or circumstances of the offense. Florida's death penalty statute comports with *Lockett, supra*, and has been so interpreted. *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Defendant, however, says that he was restricted in the presentation of evidence during the sentencing phase. The evidence which he attempted to introduce allegedly would have pointed to his innocence. This argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of defendant's trial. A further repetition of evidence pointing to guilt or innocence in the case *sub judice* would have been repetitive and pointless in the sentencing phase. The trial judge clearly recognized his duty to consider evidence in mitigation when he said that "all evidence of mitigating circumstances may be considered by the judge or jury." He also recognized his duty to assess, by a process of reasoned judgment, what factual situations required the imposition of death and which could be satisfied by life imprisonment in light of the totality of the circumstances present. The trial judge found no mitigating circumstances to be present. This is not a situation where the judge refused to hear certain evidence of mitigating circumstances.

We have carefully reviewed the record and find no merit in the points raised by defendant for reversal of his conviction or reduction of his sentence.

Finding no reversible error, the judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

STATE of Florida, Appellant,

v.

James Ronald CONSTANTINI, Paul Earnest Kersten, Samuel R. Mathes, and William Lloyd Tobin, Appellees.

No. 58112.

Supreme Court of Florida.

April 30, 1981.

Rehearing Denied July 9, 1981.

Appeal from Circuit Court, Okeechobee County; L. B. Vocelle, Judge.

Jim Smith, Atty. Gen., and Stewart J. Bellus, Asst. Atty. Gen., West Palm Beach, for appellant.

Anthony T. Young, Asst. State Atty., Okeechobee, Steve Kackley, Sebring, Michael Bloom, Miami, and H. Stephen Rash of Rash, Katzen, Kay & Pintado, South Miami, for appellees.

81-5379

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CASE NO. A-23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
SEP 8 1981
Alexander L. Stevas, Clerk

HENRY PERRY SIRECI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

MOTION TO LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, HENRY PERRY SIRECI, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for a Writ of Certiorari to the Supreme Court of Florida without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

CRAIG S. BARNARD
Chief Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HENRY PERRY SIRECI,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT

I, HENRY PERRY SIRECI, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my property I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Orange County, Florida. I appealed the judgment of conviction and the sentence of death to the Florida Supreme Court; that court affirmed both the judgment and sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

Henry Sireci
HENRY PERRY SIRECI

Duly witnessed and sworn to before me this
13 day of July, 1981.

M B Kennett
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 1, 1982

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87-5379

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO.

A-23

HENRY PERRY SIRECI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		iii
STATEMENT OF THE CASE		1 - 3
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED		4
SUMMARY OF ARGUMENT		
I	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY ANY ALLEGED COMMENT UPON THE EXERCISE OF HIS RIGHT TO REMAIN SILENT.	4 - 5
II	THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.	5
III	THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.	5 - 6
IV	THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.	6
REASONS FOR DENYING THE WRIT		
I	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY AN ALLEGED COMMENT UPON HIS RIGHT TO REMAIN SILENT.	7
II	THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.	8 - 9
III	THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE	10

TABLE OF CONTENTS
(Continued)

		PAGE
IV	THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.	11 - 12
CONCLUSION		12
CERTIFICATE OF SERVICE		13

TABLE OF AUTHORITIES

CASES	PAGE
Brown v. State, 381 So.2d 690 (Fla. 1980)	12
Chapman v. California, 386 U.S. 18 (1967)	7
Clark v. State, 363 So.2d 331 (Fla. 1978)	7
Doyle v. Ohio, 426 U.S. 610 (1976)	7
Elledge v. State, 346 So.2d 998 (Fla. 1977)	11
Hargrave v. State, 366 So.2d 1 (Fla. 1978)	8
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	8
Provence v. State, 337 So.2d 783 (Fla. 1976)	11
State v. Jones, 204 So.2d 515 (Fla. 1967)	7
Stephens v. Zant, 631 Fed.2d 397 (5th Cir. 1980)	12
Wainwright v. Sykes, 433 U.S. 72 (1977)	8, 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO.

A-23

HENRY PERRY SIRECI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, the State of Florida, respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner has broken up his Statement of the Case into two categories: trial phase and sentencing phase. He has classified the testimony during the trial phase into four general areas. Respondent would add the following in regard to these four general areas:

1. The first area concerns the discovery of the decedent and the description of the scene. Petitioner has neglected to mention that no keys to any cars were missing, nor were there any cars missing, from the scene (T 61-62). Furthermore, the decedent had various abrasions, slit neck, and fifty-five stab wounds all over his body (T 127).

2. The second area encompassed the testimony of Barbara Perkins and Bonnie Arnold. Petitioner told Perkins what happened at the car lot that night (T 194). He told Perkins that he was talking to the man about a car, he then hit the man in the head with the wrench, the man turned around,

Petitioner asked where the money was, the man wouldn't tell the Petitioner, so the Petitioner stabbed the man (T 194-195). Petitioner told Perkins he killed the man (T 195). Petitioner then indicated that he looked all over for the money and he couldn't find any, so he took the man's wallet (T 195).

Petitioner told Arnold that the police were looking for him because Petitioner had been at the car lot on the night in question to steal keys so that he could later steal a car (T 453). In so doing, Petitioner stated that he got in a fight with the car lot owner, and stabbed him (T 453). Petitioner stated to Arnold that he needed another car because his car wasn't in good shape, he didn't have clear title, and he was planning to leave Orlando, Florida (T 454). Petitioner stated that the car lot owner and Petitioner were talking about selling Petitioner a car, when Petitioner hit the decedent with a tire tool (T 455-456). A fight ensued, and Petitioner stabbed the decedent (T 455-456).

3. The third and fourth areas of testimony were in reference to the testimony of investigating officers, and others who were the recipients of Petitioner's statements. Petitioner and Donald Holtzinger discussed the crime for which Petitioner was incarcerated (T 280). Petitioner told Holtzinger about the crime of which Petitioner was charged, the fact that Petitioner killed the decedent, and the manner in which Petitioner killed the decedent (T 283).

Petiitoner spoke to his brother, Peter Sireci, about the homicide (T 416-417). Petitioner told him that he had certain credit cards from a car lot owner in Orlando, Florida, taken from the man whom he killed (T 420-421).

Petitioner told his brother-in-law, David Wilson, that Petitioner took credit cards off the body of a person whom he killed (T 491, 493, 497). Petitioner told Wilson that he killed the man with a knife (T 497). Later, Petitioner asked Wilson to

alter the knife (T 501). Petitioner told Wilson the details about the knife, and where the murder occurred (T 505-506). Subsequently, Wilson retrieved the knife from a wall ceiling of Petitioner's parents' house, and gave it to detectives (T 508). Petitioner had told Wilson where the murder weapon was (T 510).

When Petitioner was arrested, Detective Arbisi advised Petitioner of his rights (T 558-559, 597). Petitioner indicated that he did not get very much money from the decedent (T 598), and that the decedent did not offer much resistance (T 605).

In reference to the "sentencing phase" part of Petitioner's Statement of the Case, Respondent would add the following:

1. David Wilson, Petitioner's brother-in-law, employed Petitioner (S 14). He had known Petitioner for five years, and had seen him socially on occasion (S 14, 16). Petitioner was an average normal guy, a family man (S 18). Wilson was never aware that Petitioner had been cast out of his home, and Petitioner was, in fact, living with his parents (S 20). When Petitioner spoke to Wilson about the crime, and Wilson asked Petitioner why he stabbed the decedent so many times, Petitioner answered that he wanted to be sure the decedent was dead (S 18).

2. Barbara Perkins asked Petitioner why he murdered the decedent, and Petitioner stated that he did not want anybody to identify him (S 44, 45).

3. State Exhibit 50, indicating Petitioner's prior conviction for robbery was admitted into evidence (S 39).

4. Petitioner's own testimony at the sentencing phase indicated that the circumstances of his being "cast out of the home" were that he had a lot of arguments that broke the family up (S 59). They didn't go back to him, and he didn't go back to them (S 59). Petitioner said his dad did it mostly, but Petitioner was the one who left because of an argument. He was not bodily thrown out (S 59-60).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner states that the Federal questions were raised in the trial court by timely objection. This is not so. In reference to question one presented for certiorari review, no objection whatsoever was made in the trial court. Petitioner initially raised his objections in this regard on appeal. In reference to question four presented for certiorari review, Petitioner did not raise such an issue until after the Florida Supreme Court rendered its opinion affirming Petitioner's judgment and sentence. Respondent questions the timeliness of Petitioner's raising of this issue in view of the fact that Respondent discussed this exact matter in its answer brief in the Florida Supreme Court, and Petitioner failed to reply to this argument in his reply brief before the Florida Supreme Court (which was filed prior to the rendition of the Florida Supreme Court opinion).

SUMMARY OF ARGUMENT

I

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY ANY ALLEGED COMMENT UPON THE EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Petitioner failed to preserve this issue in the trial court by raising any objection to the alleged improper testimony. The State relied upon this failure to preserve in the Florida Supreme Court. The State further argued in the Florida Supreme Court that, in view of the overwhelming nature of the evidence against Petitioner, and the relatively innocuous nature of the comment in context, Petitioner's due process rights were not violated. The Florida Supreme Court implicitly recognized Petitioner's failure to properly preserve the matter in the trial court, for had Petitioner done so, the Florida Supreme Court, pursuant to its own case law, would have been obliged to reverse

Petitioner's judgment and sentence. The Florida Supreme Court further found that there was no denial of due process in light of the fact that Petitioner had made so many statements to so many people. The affirmance of Petitoner's judgment and sentence in this regard relies upon an independent State ground. Further, this Court has allowed for application of the harmless error doctrine in regards to such an issue. As such, no substantial Federal question is presented by this issue.

II

THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.

Florida Statutes specifically enumerate various "psychological" mitigating circumstances. There was substantial competent evidence to support the judge's and the jury's findings in rejecting Appellant's evidence in this regard. Any psychological or emotional disorders of Petitioner were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Petitioner is attempting to argue the applicability of the "psychological" mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing was presented which would have the effect of requiring the sentencing judge to accept Petitioner's conclusions regarding the applicability of the "psychological" mitigating circumstances.

III

THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.

The trial judge clearly recognized his duty to consider any evidence in mitigation. He stated in his sentencing order,

"All evidence of mitigating circumstances may be considered by the judge or jury." (R 294). The judge furthermore recognized his duty to assess, by a process of reasoned judgment, what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present (R 294).

In reference to Petitioner's allegation that he was indeed deprived in presenting relevant mitigating evidence, this argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of Petitioner's trial. A further repetition of evidence pointing to guilt or innocence in the sentencing phase would have been repetitive and pointless. No substantial Federal question has been presented by this point.

IV

THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.

The Florida Supreme Court found that the trial judge merely recited the two factors of "robbery-murder" and "pecuniary gain", but not give each one independent and separate weight. The Florida Supreme Court recognized that the trial judge indicated that he was aware that in valuating aggravating and mitigating circumstances he should not engage in a mere counting process of "X" number of aggravating circumstances and "Y" number of mitigating circumstances. Further, the Florida Supreme Court found that, in view of the other aggravating circumstances and the lack of mitigating circumstances, the sentence would not have been any different even if the trial judge did give improper "double weight" to two of the aggravating factors.

REASONS FOR DENYING THE WRIT

I

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY AN ALLEGED COMMENT UPON HIS RIGHT TO REMAIN SILENT.

Petitioner argues that Detective Nazarchuk's testimony regarding the fact that any interview with Petitioner was terminated when Petitioner requested his attorney after being given his rights, constitutes fundamental per se reversible error.

Petitioner raised no objection whatsoever to this testimony in the trial court. He initially raised the issue on appeal. The State relied upon and argued this factor in the Florida Supreme Court, citing the Florida Supreme Court's opinion in Clark v. State, 363 So.2d 331 (Fla. 1978). That case clearly stated on page 333 that the effect of a defendant's failure to object to such testimony had not previously been decided by the Florida Supreme Court. All cases cited by Petitioner in the instant Petition for Writ of Certiorari concerned a discussion of the issue in the context of a timely objection. The Florida Supreme Court stated in Clark, supra, that it has consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. See also, Chapman v. California, 386 U.S. 18 (1967) and Doyle v. Ohio, 426 U.S. 610 (1976), wherein this Court declined to adopt a rule that the constitutional error of comment on silence should automatically require reversal of a conviction as Petitioners therein urged. This Court announced the test to be applied in determining whether a Federal constitutional error can be held harmless is whether the Court finds the error to be harmless beyond a reasonable doubt. The Florida Supreme Court has long recognized the contemporaneous objection rule. State v. Jones, 204 So.2d 515 (Fla. 1967). This Court also has recognized the

value of the contemporaneous objection rule, holding that a defendant's failure to make timely objection to the admissibility of his inculpatory statement, without a showing of cause and prejudice, barred Federal habeas corpus review of his Miranda claim. Wainwright v. Sykes, 433 U.S. 72 (1977).

Recognizing that Florida's contemporaneous objection rule precluded Petitioner's raising of the instant issue on direct appeal to the Florida Supreme Court, that court next undertook to analyze whether or not the alleged error, in the context of the instant case, could be considered fundamental error. In view of the overwhelming nature of the evidence against Petitioner, and the many statements Petitioner gave to so many people regarding his involvement in the criminal episode, the Florida Supreme Court concluded that due process had not been violated. Petitioner's rights were well protected by the Florida Supreme Court. No substantial Federal question has been cited regarding the instant issue.

II

THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.

Petitioner is arguing that the trial court failed to give proper weight to the evidence of his mental and/or emotional problems. The trial court heard all the evidence in this regard, considered it, and rejected it. The testimony simply did not rise to the level contemplated by the psychological mitigating circumstances. It has always been held in Florida that the findings of a judge in this regard are factual matters which are not to be disturbed (absent a lack of substantial competent evidence to support the judge's findings). Hargrave v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

There was indeed substantial competent evidence to support the judge's findings in this regard. Both Dr. Kirkland and Dr. Herrera testified that any psychological or emotional disorders of Petitioner were, at most, personality disorders (S 83, 97-98). Both doctors testified that personality disorders are a lesser degree of mental illness (S 83); Dr. Herrera testified that personality disorders would be the least serious of all mental disorders (S 106). While Dr. Kirkland indicated that a person in the Petitioner's situation could be under an extreme mental or emotional disturbance, he clarified this statement by saying that he could only state that such an individual does not handle pressure well (S 78-81). Dr. Herrera was not impressed at all with Petitioner's personality as causing an extreme mental or emotional disturbance at the time of the crime(S 94). It is to be noted that he twice examined Petitioner (S 93). He classified Petitioner's illness, if anything, as merely a sociopathic disorder (S 97-98). In essence, Petitioner is attempting to argue the applicability of the "psychological" mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing was presented which could have the effect of requiring either the Florida Supreme Court or this Court to consider disturbing the findings of the judge. This is not a situation where the trial judge failed to consider the evidence in question. He considered it, and rejected it as being unworthy of having any mitigating weight in light of the evidence to the contrary (see, for example, David Wilson's testimony, previously stated). Again, no substantial Federal question has been presented.

III

THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.

Petitioner is arguing that the sentencing judge expressly limited himself to the statutory mitigating factors and refused to take into account any evidence of Petitioner's problems with his parents, etc. This simply was not the case. The trial judge clearly recognized his duty to consider any evidence in mitigation. "All evidence of mitigating circumstances may be considered by the judge or jury." (R 294). The judge furthermore recognized his duty to assess, by a process of reasoned judgment, what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present (R 294). The judge found no mitigating circumstances to be present.

Further, this is not a situation where the trial judge refused to hear certain evidence of mitigating circumstances, as Petitioner would have this Court believe. The same judge and jury heard all the evidence of guilt or innocence during the first phase of Petitioner's trial. The jury and judge were quite capable of making a determination as to the appropriateness of death, in light of the evidence of guilt of innocence as it was fully presented to them during the first phase of Petitioner's trial (even if there was some doubt which was less than a reasonable doubt in the minds of the jury and judge). A further repetition of evidence pointing to guilt or innocence in the sentencing phase would have been repetitive and pointless.

Again, there is no substantial Federal question presented by this point.

IV

THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.

It is true that Petitioner could not have raised this issue in his initial brief on appeal to the Florida Supreme Court, because he could not have known what the Florida Supreme Court's ruling would be. However, in its answer brief to the Florida Supreme Court, Respondent argued to that court that even if there was an improper "doubling up" of aggravating circumstances, this would not necessarily mandate a reversal of Petitioner's sentence in light of Elledge v. State, 346 So.2d 998 (Fla. 1977). Subsequently, in his reply brief to the Florida Supreme Court, Petitioner made no attempt to argue the inapplicability of Elledge, supra. Finally, after the Florida Supreme Court rendered its opinion, Petitioner raised the issue for the first time on rehearing. Respondent submits that, again, this was too late, and the principles espoused in Wainwright v. Sykes, supra, preclude Federal review. The denial of the rehearing, wherein this issue was initially raised, by the Florida Supreme Court rested upon an independent State ground separate and apart from any Federal question.

Regardless of the above, by no means did the Florida Supreme Court concede that the trial judge improperly doubled the aggravating circumstances of "robbery" and "pecuniary gain." To the contrary, the Florida Supreme Court found that the trial judge merely recited the two factors, but did not give each one independent and separate weight. Indeed, in his findings of fact (R 295), the trial judge clearly stated that he was familiar with Provence v. State, 337 So.2d 783 (Fla. 1976), wherein the Florida Supreme Court stated that pecuniary gain cannot be doubled up with robbery such that the two factors are considered as separate aggravating circumstances. In his

findings of fact, the trial judge furthermore indicated that he was clearly aware that in evaluating the aggravating and mitigating circumstances, it was not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment (R 294).

Stephens v. Zant, 631 Fed.2d 397 (5th Cir. 1980) is simply not on point. Therein, the Fifth Circuit Court of Appeals stated that where (1) the sentencer improperly relied on an unconstitutional aggravating circumstance, and (2) it could not be determined that the sentence of death would have been the same absent this circumstance, the sentence must be set aside. Not only did the Florida Supreme Court find that the trial judge did not give improper "double weight" by merely reciting the two factors, but also the Florida Supreme Court found that, in view of the other aggravating circumstances and the lack of mitigating circumstances, the sentence would not have been any different even if the trial judge gave improper "double weight." Such is the standard that has been applied by the Florida Supreme Court. Brown v. State, 381 So.2d 690 (Fla. 1980), and this standard is quite consistent with Stephens v. Zant, supra, and due process.

Again, no substantial Federal question has been presented for review in this regard.

CONCLUSION

In light of the foregoing, Respondent respectfully requests that this Court deny the instant Petition for Writ of Certiorari to the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by courier/mail, to CRAIG S. BARNARD, ESQUIRE, Chief Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401, this 8th day of October, 1981.

Robert L. Bogen
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981
CASE NO.
A-23

HENRY PERRY SIRECI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

STATEMENT OF MAILING

I HEREBY CERTIFY that the instant Response to Petition for Writ of Certiorari to the Supreme Court of Florida in the above-referenced case was deposited in a United States Post Office or mail box, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, within the time allowed for filing of the Response to Petition for Writ of Certiorari to the Supreme Court of Florida, i.e., by October 8, 1981 (30 days after receipt of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida in the above-styled case).

JOY B. SHEARER
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SWORN to and SUBSCRIBED
before me this 6 day of
October, 1981.

Notary Public, State of Florida
My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES FEBRUARY 16, 1982
BONDED THRU MAYNARD BONDING AGENCY